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| <b>VICKI M. HARVEY</b>           | ) |                    |
| Claimant                         | ) |                    |
| VS.                              | ) |                    |
|                                  | ) |                    |
| <b>THE HERTZLER CLINIC, P.A.</b> | ) | Docket No. 187,637 |
| Respondent                       | ) |                    |
| AND                              | ) |                    |
|                                  | ) |                    |
| <b>DODSON INSURANCE COMPANY</b>  | ) |                    |
| Insurance Carrier                | ) |                    |

Claimant appeals from an Order dated May 14, 1998, that deauthorizes one of the physicians that has treated claimant and directs respondent to provide a list of three qualified physicians from which claimant may choose a new authorized treating physician. The Order, entered by Administrative Law Judge Bruce E. Moore, also ordered respondent to pay all medical bills, including the costs for prescription medications, incurred before the date of the Order.

The issues claimant raises on appeal all deal with medical treatment, and primarily whether Dr. Ronald R. Reschly should continue to be authorized as claimant's primary treating physician. The Appeals Board must first determine whether an Administrative Law Judge has the authority to conduct a preliminary hearing after entering the award and, if so, what the Appeals Board's jurisdiction is to hear an appeal from a post-award preliminary hearing order.

After reviewing the record and considering the arguments presented, the Appeals Board finds and concludes as follows:

An Administrative Law Judge may conduct a preliminary hearing as a part of a post-award review and modification proceeding.

The Appeals Board has on many occasions approved the use of the preliminary hearing procedures as a part of a post-award application for review and modification. The Board had done so, however, largely based upon the fact the parties have treated the proceedings as a preliminary hearing.

Although the preliminary hearing statute K.S.A. 1997 Supp. 44-534a does not specifically provide that this is also a procedure to be used post-award, there is, however, other statutory authority for a post-award preliminary hearing. In Andrews v. Blackburn, Inc., Docket No. 158,135 (July 1996), the Appeals Board, for several reasons, concluded that the preliminary hearing procedure may be used in a post-award proceeding. First, the above quoted language from K.S.A. 1997 Supp. 44-534a was not, in our opinion, intended to limit the use of preliminary hearings. Instead, it was intended to indicate that the final award would supersede any preliminary hearing order. An application for review and modification reopens the hearing. Second, policy justifications for preliminary hearings before an award continue to exist after an award. The need for a prompt resolution of issues relating to medical care and temporary total disability benefits may be as urgent after an award as before. Finally, the Act contains at least one example where the legislature expressed the authorized use of a preliminary hearing procedure after an award. K.S.A. 1997 Supp. 44-556 authorizes the use of preliminary hearing procedures under K.S.A. 1997 Supp. 44-534a to enforce rights to medical treatment while a case is pending on appeal before the Court of Appeals. Also, K.S.A. 1997 Supp. 44-551(b)(2)(C) authorizes the use of a preliminary hearing to enforce payment of medical benefits while a case is pending before the Appeals Board.

By affirming the use of a preliminary hearing procedure after an award, the Appeals Board understands it is ratifying a long standing practice that has existed and been followed by the Division and by practicing attorneys generally. The practice is consistent with the statutory scheme and applicable policy considerations. The Administrative Law Judge did not, therefore, exceed his jurisdiction in this case by conducting a preliminary hearing as a part of a post-award review and modification proceeding.

The Board recognizes that there is some confusion concerning what procedure is to be followed post-award in proceedings involving medical benefits. Typically, an award will provide for future medical benefits upon application to and approval by the director. Unfortunately, neither the Act nor the regulations set out what form that application should take. An attempt was made this past legislative session to implement such a procedure statutorily. That bill, however, was not enacted. Absent some statutory or regulatory change, or guidance from an appellate court, the Appeals Board will continue to follow its policy of treating post-award applications for medical treatment as preliminary hearings where the matter was heard pursuant to a Form E-3 Application for Preliminary Hearing and the preliminary hearing procedures were followed; and as a final order where the

matter came before the Administrative Law Judge on a motion and preliminary hearing procedures were not followed.

This matter came on for hearing before the Administrative Law Judge pursuant to claimant's filing of a Form E-3 Application for Preliminary Hearing and an Application for Review and Modification/Application for Post Award Medical and Attorney Fees. The next day respondent also filed an Application for Preliminary Hearing and a Motion to Terminate Benefits. This, in turn, was followed by claimant's Application for Penalties. The Administrative Law Judge's orders concerning claimant's request for attorney fees and penalties would be considered final orders and therefore subject to review by the Board, but the penalties motion was not heard and the Administrative Law Judge did not make findings concerning attorney's fees. Therefore that issue was not raised in this appeal.

That the parties treated the medical treatment issue as a preliminary hearing is further evidenced by the fact that the applications for preliminary hearing were preceded by the notice of intent letters mandated by the preliminary hearing statute, K.S.A. 1997 Supp. 44-534a. Also, the medical evidence was introduced into the hearing record without foundation as is permitted for preliminary hearings by K.A.R. 51-3-5a. Moreover, at the outset of the May 14, 1998, proceedings, the Administrative Law Judge announced:

The matter comes on today for preliminary hearing post award . . . . Claimant's filed an application for preliminary hearing seeking additional medical . . . . And this is a preliminary hearing. This is not a final hearing on the application for review and modification and if we get to that point, in the absence of a stipulation, then we'll have to go out and take Dr. Reschly's deposition.

Because the parties' applications concerning post-award medical treatment were treated as applications for preliminary hearing, the Appeals Board does not have jurisdiction to consider claimant's argument that the evidence does not support a finding that claimant is in need of a change in authorized treating physician.

K.S.A. 1997 Supp. 44-551 limits the jurisdiction of the Appeals Board. The Appeals Board has jurisdiction to review decisions from a preliminary hearing in those cases where one of the parties has alleged the Administrative Law Judge exceeded his or her jurisdiction. This includes specific jurisdictional issues identifying K.S.A. 1997 Supp. 44-534a. A contention that the Administrative Law Judge has erred in his finding that the evidence shows a need for a change in the authorized treating physician is not an argument the Appeals Board has jurisdiction to consider.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore, dated May 14, 1998, remains in full force and the claimant's application for review of that Order should be, and the same is hereby, dismissed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 1998.

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BOARD MEMBER

c: Robert R. Lee, Wichita, KS  
Stephen J. Jones, Wichita, KS  
Bruce E. Moore, Administrative Law Judge  
Philip S. Harness, Director